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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1959

No. 452

FERNANDO S. FORFARI,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI
to the United States Court of Appeals
for the Ninth Circuit.

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PETITION FOR A WRIT OF CERTIORARI
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Fernando S. Forfari, plaintiff in the District Court for the Northern District of California, Northern Division, appellee in the United States Court of Appeals for the Ninth Circuit, petitions for a writ of certiorari to the latter Court, to review the judgment of said Court of Appeals which reversed a judgment for plaintiff-appellee Forfari for $12,673.26 under the Federal Tort Claims Act (28 U.S.C. 1346(b)) on

the ground that "Forfari was at the time of his injury a federal employee, and that he is precluded from bringing an action under the Tort Claims Act."

OPINIONS OF LOWER COURTS.

The District Court wrote two Opinions (only the first of which is material on this petition) neither of which is officially reported. They appear respectively at pp. 10 and 13 of the record; and are respectively Appendices "A" and "B" to this petition.

The opinion of the Court of Appeals has not yet been officially reported; it appears at p. 128 of the Record, and is Appendix "C" to this petition.

JURISDICTION STATEMENT.

The judgment of the United States Court of Appeals for the Ninth Circuit was rendered and entered June 8, 1959, and appears as Appendix "D" to this petition. On August 24, 1959, Mr. Justice Black signed an order extending petitioner's time to petition for certiorari, to and including October 6, 1959. The Supreme Court has jurisdiction to review the judgment of the Court of Appeals under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED FOR REVIEW.

Two questions are presented for review:

(1) Where employees of a non-appropriated fund agency are covered by private employers' (State of

California) workmen's compensation insurance (and later compulsorily covered by private employers' insurance under the Longshoremen's and Harborworkers' Compensation Act (33 U.S.C. 901, et seq.), is the remedy *of compensation* intended to preclude a damage suit under the Federal Tort Claims Act (28 U.S.C. 1346(b)) against the United States as *a third party tort-feasor* (the private compensation statutes authorizing such third party suits)?

(2) Where employees of a non-appropriated fund agency are *covered by private workmen's compensation insurance,* are they to be considered employees of the United States, so as to bar a third party tort-feasor suit against the United States under the Federal Tort Claims Act?

STATUTES INVOLVED.

The following statutes are involved either directly or indirectly:

(1) *Directly*

(a) The Federal Tort Claims Act, 28 U.S.C. 1346(b);

(b) The California Workmen's Compensation Act, Cal. Labor Code, secs. 3201-6149, especially sec. 3852, authorizing damage suits against third party tort-feasors;

(c) Naval Civilian Personnel Instruction 66, secs. 2-1, 2-2, 2-3, 4-1, 4-2;

(d) California Insurance Code, secs. 11770, 11774, 11778, 11779 (the nature and powers of the California State Compensation Insurance Fund).

(2) *Indirectly*

(a) Longshoremen's and Harborworkers' compensation Act, 33 U.S.C. 901-950, especially 33 U.S.C. 933, authorizing damage suits against third party tort-feasors;

(b) 5 U.S.C. 150k;

(c) 5 U.S.C. 150k-1 (before and after 1958 amendment);

(d) 5 U.S.C. 150k-1, as amended 1958;

(e) Federal Employees' Compensation Act, 5 U.S.C. 751-803.

The following are set forth verbatim in Appendix "D" to this petition:

(1) (a) 28 U.S.C. 1346(b);

(b) Cal. Lab. Code, sec. 3852;

(c) Cal. Ins. Code, secs. 11770, 11774, 11778, 11779;

(d) Naval Civilian Personnel Instruction 66, secs. 2-1, 2-2, 2-3, 4-1, 4-2.

(2) (a) 33 U.S.C. 933;

(b) 5 U.S.C. 150k;

(c) 5 U.S.C. 150k-1 before 1958 amendment;

(d) 5 U.S.C. 150k-1 as amended 1958.

STATEMENT OF CASE.

(The parties will be referred to by their trial Court designations of plaintiff and defendant.)

(R. 15) (Findings of Fact):

Finding 1. "That this Court has jurisdiction of this cause of action by reason of the provisions of the Federal Tort Claims Act, Title 28, U.S.C., Sections 921-946. That on November 21, 1951, at or about 1:00 o'clock p.m., plaintiff sustained personal injuries as a result of a fall down a staircase in a building owned and maintained by the United States of America, located at the Mare Island Naval Yard, Vallejo, California."

Finding 2. "At the time of his fall, plaintiff was an employee of the Mare Island Cafeteria System, a non-appropriated fund agency organized for the purpose of supplying food to the naval yard employees. Plaintiff was working in the Commissioned Officers' Club, also a non-appropriated fund agency."

Finding 3. "That on the date of plaintiff's accident and fall as aforesaid, the defendant, United States of America, was negligent in:

(1) Failing to provide a hand rail on the right hand side descending of said staircase,

(2) Permitting the protrusion of steel strips affixed to the edge of each step in such a manner that they created a hazard to persons walking down said steps, and

(3) Failure to properly light the staircase at the time in question."

At the time of his accident plaintiff was covered by private employers' compensation insurance under the

California Workmen's Compensation Act, the insurance carrier being the California State Compensation Insurance Fund. (R. 22-23, 35-36; R. 79-80, Plaintiff's Exs. 1 and 2; Conclusions of Law 3, R. 17; Judgment, 2 R. 18, Opinion Court of Appeals, R. 133-4.)

(R. 16) Finding 8—

> "That by reason of the negligence of the defendant and as a proximate result thereof, plaintiff required and received medical and hospital care and attention supplied and paid for by the California State Fund Insurance Company, insurance carrier for plaintiff's employer, in the amount of Four Thousand Eighty-five and 76/100 Dollars ($4,085.76)."

The non-appropriated agencies were and are civilian agencies, under direction of Naval personnel, but dependent entirely on money which they themselves make as a business; they are neither supported nor aided by tax money; surplus profits are used to increase and improve the services which these agencies render. (Opinion of Court of Appeals, R. 130-31; R. 45-48, 51-2.)

The Court of Appeals concluded (1) that the plaintiff's remedy by workmen's compensation precluded a third party tort-feasor's suit; and (2) that the plaintiff was an employee of the United States. (We believe these two issues are separate, though the Court of Appeals did not separate them.)

JURISDICTION OF LOWER COURTS.

The District Court had jurisdiction of the action under 28 U.S.C. 1346(b) (Federal Tort Claims Act); the District Court for the Northern District of California, Northern Division had jurisdiction because the accident happened at the Mare Island Navy Yard, Vallejo, California. (Findings, R. 14-15.)

The Court of Appeals had jurisdiction on the appeal of the Government under 28 U.S.C. 1291.

REASONS FOR GRANTING WRIT OF CERTIORARI.

A writ of certiorari should be granted for the following reasons:

(1) There is a conflict among the circuits as to whether employees of non-appropriated fund agencies may sue the United States as a third party tort-feasor, apart from their *private workmen's compensation* (albeit that the conflicting decisions in the Second and Seventh Circuits are District Court cases only);

(2) The Court of Appeals misapplies both *Standard Oil Co. v. Johnson,* 316 U.S. 481, and *Johansen v. U. S.,* 343 U.S. 427, in holding that the employees of non-appropriated fund agencies placed under the *private* workmen's compensation, first of the California Workmen's Compensation Act and later of the Longshoremen's and Harborworkers' Compensation Act, must look to compensation as their only remedy, though *both acts provide for the additional remedy of a third party tort-feasor's suit;*

(3) The Court of Appeals misapplies the relevant statutes and the reasoning of *Johansen v. U. S.*, 343 U.S. 427, in holding employees of non-appropriated fund agencies to be employees of the United States, although placing them under *private workmen's compensation* indicates the intention *not* to treat them as employees of the United States.

We discuss these points in order.

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(1) CONFLICT AMONG CIRCUITS.

As the Court of Appeals recognizes, the District Courts of the Second and Seventh Circuits have held that employees of non-appropriated fund agencies may sue the United States under the Federal Tort Claims Act. *Falen v. U. S.* (D.C.E.D. N.Y. 1949) 125 F.S. 630; *Daniels v. Chanute Air Force Base Exchange* (D.C.E.D. Ill. 1955) 127 F.S. 920.

While it is true that these are District Court cases only, it is also true that the Court of Appeals of the Ninth Circuit cannot reverse them, but must "disagree" with them, as it would with the decision of another Court of Appeals. As the authorities stand now, there is an unresolved conflict among the Circuits.

The District of Columbia Circuit has held the same as the Ninth Circuit in the case at bar. *Aubrey v. U. S.*, 254 F. 2d 768.

(2)-(3) REMEDY OF WORKMEN'S COMPENSATION NOT ONLY REMEDY.

The Court of Appeals relies on *Standard Oil Co. v. Johnson,* 316 U.S. 481, and *Johansen v. U. S.,* 343 U.S. 427 and cases which derive from them, for its holding that plaintiff's workmen's compensation remedy is his only remedy.

But *Standard Oil Co. v. Johnson,* 316 U.S. 481, is inconclusive; and the reasoning of *Johansen v. U. S.,* 343 U.S. 427, leads to the opposite result.

(a) *Standard Oil Co. v. Johnson,* 316 U.S. 481, involved the question whether a *State* could tax the gasoline used at an army post exchange.

First, the question was one of constitutional law—the relative fields of Federal and State power. There was *no expression of Congressional intent* to permit state taxation in a field which was *prima facie* federal. Cf. cases holding that such immunity exists only *in the absence of Congressional consent: Smith v. Davis,* 323 U.S. 111, 113; *U. S. v. Allegheny County,* 322 U.S. 174, 176; *U. S. v. Detroit,* 355 U.S. 466, 469.

The constitutional issue of taxation is, of course, a different one from any statutory question of remedies available to employees for personal injuries; general language in the *Johnson* case must be read in the light of its facts. (*Cohens v. Virginia,* 19 U.S. 264, 399-400.)

Second. While *Standard Oil v. Johnson,* 316 U.S. 481 dealt with the situation where Congress had *not* given its consent to state taxation of government instrumentalities, the present case involves a situation

where Congress *has given its consent first* that workmen's compensation shall *not be the only remedy* of the employees of the non-appropriated fund agencies, and *second* that the United States should *not be considered the employer of such employees.* We give the reasons for this conclusion *infra* in the discussion of *Johansen v. U. S.*, 343 U.S. 427.

(b) The reasoning of *Johansen v. U. S.*, 343 U.S. 427, itself leads to the conclusion that—(1) Congress did not intend workmen's compensation to be the only remedy for employees of non-appropriated fund agencies; and (2) that Congress did not intend that the United States be in the position of employer of this class of personnel (for which reason they can sue the United States as a third-party tort-feasor).

First. Forfari's accident happened on November 21, 1951—before both the enactment (1952) of 5 U.S.C. 150k and 150k-1, and before the 1958 amendment to the latter section. The Court of Appeals gives the following summary of the purpose and effect of 5 U.S.C. 150k, as passed in 1952 (R. 131-132):

> "In June of 1952, Congress enacted (66 Stat. 138) 5 U.S.C. § 150k, which expressly exempted civilian employees of non-appropriated fund activities from the operation of the Civil Service Commission and the provisions of the Federal Employees Compensation Act. The legislative history of this Act clearly shows that the Act was passed to allay the doubts raised by the *Standard Oil* case, *supra*, as to whether or not the various Civil Service laws and regulations were applicable to civilian employees of non-appropriated

fund activities. The Civil Service Commission believed that as a result of the *Standard Oil* case 'it was necessary to consider persons employed in these activities as federal employees and subject to the usual personnel laws.'"

Second. In 1952, 5 U.S.C. 150k expressly removed non-appropriated fund employees from the Federal Employees Compensation Act and the 1958 amendment to 5 U.S.C. 150k-1 expressly put employees of non-appropriated fund agencies under the Longshoremen's and Harborworker's Compensation Act. (See Appendix p. xxviii.)

Third. As the Court of Appeals says, prior to 1958, the Mare Island non-appropriated fund employees were covered under the California Compensation Act (R. 138):

> "However, as indicated in the legislative history, it was the practice of the exchanges, food services, and the like, to provide the workmen's compensation that the June, 1952, act later made mandatory. The Mare Island Cafeteria System did provide Forfari with such benefits. It is conceded that the California State Fund Insurance Company has awarded Forfari $4,085.76 for the injuries sustained by reason of his fall."

Before 1958, Congress *permitted* non-appropriated fund employees to be covered by state-administered private employers' workmen's compensation; in 1952 it expressly withdrew these employees from the Federal Employees' Compensation Act, and directed compensation *not less* than that of the Longshoremen's

and Harborworkers' Act; in 1958 it expressly put these employees under the Longshoremen's and Harborworkers' Compensation. The differences between the California Act and the Longshoremen's and Harborworkers' Act as regards this point are procedural and of no moment here. See Cal. Lab. Code, sec. 3852 and 33 U.S.C. 933, quoted in Appendix "D".)

Thus there has been a continuous practice (first *de facto*, and later crystallized by statute) of placing the employees of non-appropriated fund agencies under private employers' compensation, permitting a third party tort-feasor's suit.*

Fourth. The entire reasoning of *Johansen v. U. S.*, 343 U.S. 427, is that the *Federal Employees Compensation Act makes workmen's compensation the exclusive remedy against the United States* of all employees covered by that Act. (343 U.S. 427, 429, 431, 433, 436, 439-41.) Note particularly the language at p. 431—

> "These enactments were not usually directed toward cases where the United States *had already put aside its sovereign armor*, granting relief in other forms." (Italics added.)

But Forfari was not under the Federal Employees' Compensation Act.

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*The provision of 5 USC 150k-1(c) as amended in 1958 that the named remedy shall be exclusive does not affect the question here: by incorporating the Longshoremen's and Harborworkers' Compensation Act by reference, 5 USC 150k-1(c) incorporates the double remedy which that act provides. While this amendment was several years subsequent to Forfari's injury, it is important in showing the *subsisting importance of the problem.*

Where compensation is to be paid under an act covering *private employers,* and entirely out of *funds accumulated from the profits of a business* operated like a private enterprise, it cannot be said that the United States has "put aside its sovereign armor". Rather, it has carefully segregated private activities, paid out of private funds, from its sovereign activities.

Furthermore, *Johansen v. U. S.*, 343 U.S. 427, states that the Federal Employees Compensation Act covers *all* employees of the United States (p. 439):

> "The Federal Employees Compensation Act 5 USC §§ 751 et seq. was enacted to provide for injuries to government employees in the performance of their duties. *It covers all employees.*" (Italics added.)

If so, then any employees who are placed under a different compensation act, are not employees of the United States Government for the purpose of remedies for industrial accidents. If they are not employees of the United States Government, they can sue the United States as a third party tort-feasor. This is a remedy provided both by the California Workmen's Compensation Act (Cal. Lab. Code 3852) and by the Longshoremen's and Harborworkers' Compensation Act. (33 U.S.C. 933.)

In view of this analysis, we submit that *Aubrey v. U. S.*, 254 F. 2d 768, makes an inadequate disposition of the matter. While both the *Johansen* and the *Aubrey* opinions were written by Justice Reed, we respectfully submit that the one-sentence conclusion on

this point in *Aubrey v. U. S.* is actually contrary to the reasoning of the *Johansen* case.

Aubrey v. U. S., 254 F. 2d 768, first shows the intent not to have public funds bear the cost of workmen's compensation of non-appropriated fund agencies (p. 771):

> "The requirement that the instrumentalities themselves provide the protection, by insurance or otherwise, was obviously intended to insure that the cost of such protection would be paid out of the proceeds of these self-supporting activities and not out of public funds."

Then, however, the District of Columbia Circuit says (p. 772):

> "We conclude that Aubrey is precluded from maintaining this suit under the Tort Claims Act by the principle set forth in Feres and Johansen that the Act was not intended to grant the right to sue the Government to one who has been provided another remedy against its own instrumentality . . . *We do not think the fact that the insurer is not the United States but a private insurance carrier requires a distinction between this case and Feres and Johansen.*". (Italics added.)

On the contrary, even under the language of *Johansen v. U. S.*, placing employees under a different compensation system from that of the Federal Employees Compensation Act, indicates an intention that they shall not be treated as employees of the United States for the purpose of industrial accidents.

Fifth. The Court below speculates that (R. 134):

> "We believe it is reasonable to say that, if in 1951 the Mare Island Cafeteria System had not provided its employees with workmen's compensation for injuries incurred by them in the scope of their employment, such injuries would have been compensable under the Federal Employees Compensation Act, and that it took the passage of § 150k in 1952 to remove employees such as Forfari from the protection afforded by the Federal Employees' Compensation Act."

But in 1951 private compensation for employees of non-appropriated fund agencies was operating at least *de facto,* and at least with the Government's tacit consent. When 5 U.S.C. 150k was passed in 1952, it approved and crystallized a system which was already in operation. It should be noted that, while in the above quotation the Court of Appeals seems to say that 5 U.S.C. 150k changed the existing system, at R. 134, it says just the opposite:

> "Yet, when the entire statutory system of remedies provided by the federal government for its employees is viewed in perspective, it is clear that such injuries *are and always have been* beyond the purview of the Tort Claims Act." (Italics added.)

We submit the correct conclusion is the opposite. The employees were first tacitly and later expressly under private workmen's compensation insurance rather than under the Federal Employees Compensation Act. This indicates an intention that they shall not be considered employees of the United States for

the purposes of workmen's compensation, and would permit them to sue the United States as a third party tort-feasor, to the extent permitted by the applicable private compensation act, and to the extent that tort liability may exist by the laws of the place of the accident.

CONCLUSION.

For the above stated reasons it is submitted that the writ of certiorari be granted.

Dated, San Francisco, California,
September 25, 1959.

Respectfully submitted,
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(Appendices "A", "B", "C", "D" and "E" Follow.)